STATE OF MICHIGAN
IN THE SUPREME COURT

MARGARET PHILLIPS, as Personal Representative of the Estate of REGEANA DIANCE HERVEY, Deceased,

Plaintiff-Appellant

vs.

MIRAC, INC.,

Defendants-Appellants

Supreme Court No. 121831

Court of Appeals No. 227257

Saginaw County Circuit Court No. 98-023923 NI

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AMICUS CURIAE BRIEF OF MICHIGAN STATE MEDICAL SOCIETY

THIS APPEAL INVOLVES A RULING BY THE COURT OF APPEALS THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION, IS VALID.

KERR, RUSSELL AND WEBER, PLC
Richard D. Weber (P22073)
Joanne Geha Swanson (P33594)
Attorneys for Amicus Curiae
Michigan State Medical Society
Detroit Center, Suite 2500
500 Woodward Avenue
Detroit, MI 48226-3406
313.961.0200

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QUESTION PRESENTED FOR REVIEW

Whether MCL 257.401(3), setting a cap on the amount of damages recoverable for the vicarious liability of persons engaged in the business of leasing motor vehicles, is constitutional.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Amicus Curiae Michigan State Medical Society refers this Court to the Statement of Facts contained in Defendant-Appellee MIRAC, Inc.'s Brief on Appeal.

INTEREST OF MICHIGAN STATE MEDICAL SOCIETY

The issue raised by this appeal relates to the constitutionality of a statutory cap on the amount of damages recoverable for the vicarious liability of persons engaged in the business of leasing motor vehicles. MCL 257.401(3). The cap was enacted in 1995 to address a concern that companies engaged in the leasing of motor vehicles were unfairly burdened with unlimited vicarious liability. Upon Plaintiff's challenge to the constitutionality of the damages limitation, the Trial Court held that the statutory limitation on recoverable damages violated Plaintiff's right to a trial by jury, to equal protection of the laws and to due process. In *Phillips v MIRAC, Inc.*, 251 Mich App 586; 651 NW2d 437 (2002) the Court of Appeals *reversed* the Trial Court, upholding the constitutionality of the damages limitation. This Court granted leave and the question is now before this Court.

The statute at issue in this case is one of several similar Michigan statutes that limit the recovery of damages in certain contexts. A limitation on the recovery of non-economic damages in medical malpractice cases, MCL 600.1483, was enacted by the Legislature in 1986 and amended in 1993 as part of Michigan's tort reform initiative. It was designed to "control increases in health care costs by reducing the liability of medical care providers, thereby reducing malpractice insurance premiums, a large component of health care costs." *Zdrojewski v Murphy,* 254 Mich App 50; 657 NW2d 721 (2002). The Court of Appeals upheld the constitutionality of the medical malpractice non-economic damages cap in *Zdrojewski* against the same challenges made here, relying in part on the Court of Appeals decision in *Phillips*.

A non-economic damages cap also applies to products liability actions pursuant to MCL 600.2946a. The constitutionality of that statute was upheld in *Kenkel v The Stanley Works,* 256

Mich App 548; 665 NW2d 490 (2003), where the Court of Appeals concluded that the statute was "rationally related to the legitimate governmental interests of encouraging the manufacture and distribution of products in Michigan and protecting those who place products in the stream of commerce from large damage awards in jury trials." In reaching its decision, the Court of Appeals relied upon *Phillips* and *Zdrojewski.*

MSMS is a professional association that represents the interests of over 14,000 physicians in the State of Michigan. MSMS spent years analyzing the medical liability crisis in Michigan and joined numerous other organizations and entities advocating the promulgation of tort reform. Damages caps have become an essential tool of Legislatures throughout the country in dealing with the social and economic impact of years of runaway jury verdicts. Caps statutes have been enacted in a variety of contexts and exist in varying forms. Although some courts have held that the particular caps they have addressed are constitutionally infirm, a far greater number of courts have sustained the caps as a constitutional exercise of legislative authority.

Because Michigan's caps statutes have been subjected to similar challenges, this Court's decision in *Phillips* will undoubtedly impact the non-economic damages caps applicable to medical malpractice and products liability cases. MSMS believes that the Court of Appeals correctly analyzed the issues raised by the constitutional challenges in *Phillips, Zdrojewski and Kenkel,* and properly determined that the damages limitations were constitutionally permissible exercises of legislative authority. MSMS seeks to more fully enhance this Court's understanding of the issues raised in this appeal and to express its views, by submitting this amicus curiae brief for this Court's consideration.

ARGUMENT

I. A STATUTE IS PRESUMED CONSTITUTIONAL AND MUST BE UPHELD UNLESS ITS INVALIDITY IS READILY APPARENT.

The constitutionality of a statute is a question of law which the court reviews de novo. *Heinz v Chicago Road Investment Co,* 216 Mich App 289; 549 NW2d 47 (1996). The burden of proving the constitutional violation is on the party asserting it. *Brown v Siang,* 107 Mich App 91, 97; 309 NW2d 575 (1981). If the statute can be construed in a manner that is consistent with the constitution, its validity must be upheld. *Id.* As this Court observed in *Thayer v Department of Agriculture,* 323 Mich 403; 35 NW2d 360 (1949):

> No rule of construction is better settled in this country, both upon principle and authority, than that the acts of a State legislature are to be presumed constitutional until the contrary is shown; and it is only when they manifestly infringe some provision of the Constitution that they can be declared void for that reason. In cases of doubt, every possible presumption, not clearly inconsistent with the language and the subject matter, is to be made in favor of the constitutionality of the act.

323 Mich at 410 (quoting *Sears v Cottrell,* 5 Mich 251 (1858)). Thus, the power to declare a law unconstitutional should be "exercised with extreme caution, and never where serious doubt exists as to the conflict." *Id.*

There is no constitutional conflict here. The damages cap imposed by the Owners Liability Act is a proper exercise of legislative authority. As is more fully discussed below, the high standard for invalidation has not been met.

II. THE AUTO LESSORS' LIABILITY LIMITATION IS A CONSTITUTIONAL EXERCISE OF LEGISLATIVE AUTHORITY.

A. THE COURT OF APPEALS HAS UNIFORMLY UPHELD THE CONSTITUTIONALITY OF MICHIGAN'S STATUTORY DAMAGES LIMITATIONS.

The Michigan Court of Appeals has uniformly upheld the constitutionality of the three statutory damages limitations that have been enacted by the Legislature over the past decade. The same unassailable analysis prevailed in each case, despite two vocal dissents.

The Court of Appeals first addressed the constitutionality of such a statute in the present case, *Phillips v MIRAC, Inc., supra.*[1] Absent negligence by the lessor, MCL 257.401(3) limits recovery to $20,000 in an action against the lessor of a motor vehicle if the bodily injury or death involves a motor vehicle leased for thirty days or less.[2] The accident resulting in the death of the decedent in *Phillips* involved such a vehicle. Suit was commenced under the statutory ownership liability section of the Motor Vehicle Code pursuant to which a motor vehicle owner is deemed liable "for any injury occasioned by the negligent operation of the motor vehicle" if the motor vehicle is being driven with the owner's "express or implied consent or knowledge." MCL 257.401. There was no allegation of negligence in leasing the vehicle to the driver. Following trial, the jury returned a verdict in the amount of $900,000, which was subject to a $250,000 maximum/$150,000 minimum "high-low" agreement and the statutory limitation in MCL 257.401(3). In proceedings for entry of judgment, the Trial Court held that the statutory cap violated the right to jury trial, equal protection and due process. The Court of Appeals rejected these rulings.

Relying in part on *Phillips,* the Court of Appeals also rejected challenges to the constitutionality of a statutory damages cap in *Zdrojewski v Murphy*, 254 Mich App 50; 657 NW2d 721 (2002), a medical malpractice action. In that case, the jury awarded plaintiff

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[1] In *Phillips*, the Court of Appeals noted that the "constitutionality of this damages cap raises a question of first impression." 251 Mich App at 590.

[2] The limit is increased to $40,000 if the accident results in bodily injury to or the death of two or more persons. MCL 257.401(3).

$174,686 in past economic damages, $200,000 in past non-economic damages, $256,678 in future economic damages and $256,678 in future non-economic damages. In entering judgment, the Trial Court reduced the award of non-economic damages pursuant to the statutory cap in MCL 600.1483. Rejecting plaintiff's assertion that the cap was unconstitutional, the Trial Court concluded that the statute was constitutionally sound. That ruling was affirmed by the Court of Appeals.

The analysis and reasoning of *Phillips* and *Zdrojewski* was most recently adopted in *Kenkel v The Stanley Works,* 256 Mich App 548; 665 NW2d 490 (2003). One of the issues in *Kenkel* was the constitutionality of the noneconomic damages cap applicable to products liability actions pursuant to MCL 600.2946a. The statute limits damages for noneconomic loss to $280,000 unless the defect in the product caused death or permanent loss of a vital bodily function, in which case damages are capped at $500,000. The Trial Court ruled that MCL 600.2946a(1) infringed upon the right to jury trial, equal protection and separation of powers, and entered judgment in excess of $1.5 million. The Court of Appeals reversed.

The result reached by the Court of Appeals in each of these cases is analytically sound and is supported by the decisions of numerous courts in jurisdictions throughout the country.

1. The Court of Appeals Properly Held That The Statutory Damages Cap Does Not Violate the Right to a Jury Trial.

Recognizing that the Michigan Constitution guarantees the right to a jury trial,[3] Const. 1963, art 1, § 14, and that this "includes the right to have the jury assess damages", the *Phillips*

[3] This Court has held that the primary source for determining the meaning of the right to trial by jury is to examine "its plain meaning as understood by its ratifiers at the time of its adoption." *The Charles Reinhart Co v Winiemko,* 444 Mich 579, 606; 513 NW2d 773 (1994), *also quoting Tabor v Cook,* 15 Mich 322, 325 (1867), for the proposition that "[t]he intention here is plain, to preserve to parties the right to have their controversies tried by jury, in all cases where the right then existed."

majority nonetheless concluded that the damages cap did not infringe the right to jury trial. The Court first observed that the Legislature "has the power to abolish or modify common law and statutory rights and remedies," reciting the Constitution's provision that:

> [t]he common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.

Const. 1963, art 3, § 7. "Simply stated," the Court concluded, "what the Legislature gives, it may take away" and "[w]here the Legislature can abolish a cause of action, it necessarily follows that it can limit the damages recoverable for the cause of action." 251 Mich App at 592.

The *Phillips* majority cited examples wherein the Legislature utilized its power to limit or wholly eliminate a defendant's liability, including the governmental immunity act, MCL 691.1407; the workers' compensation act, MCL 418.131; the act that limits landowners' guest liability to gross negligence or willful and wanton misconduct, MCL 324.73301; and statutes of limitation and repose, MCL 600.5805. The majority also noted that a number of statutes in existence at the time the Constitution was enacted "provided, and continue to provide, for double or treble damages in civil actions", such as MCL 230.7, which provides treble damages for injuries to bridges, and MCL 429.103, which provides for the doubling of damages sustained for breach of a contract for the sale of Michigan wheat. The majority said:

> Although these statutes increase, rather than decrease, the amount of damages awarded, they nonetheless modify the jury award. Such increases in damages demonstrate that a defendant's right to have a jury assess liability and damages can be legislatively altered.

251 Mich App at 593-594.

The majority further concluded that the right to jury trial was not violated by the statutory limitation because "it does not infringe on the jury's right to decide cases" but merely "limits the

legal consequences of the jury's finding", as in *Heinz v Chicago Road Investment Co,* 216 Mich App 289, 299-300; 549 NW2d 47 (1996)(collateral source rule does not violate the right to jury trial). The Court explained:

> The damages cap in subsection 401(3) in no way removes from the jury the determination of facts and of the amount of damages that the injured plaintiff incurred. Rather, subsection 401(3) simply limits the amount of those damages that can be recovered from a lessor of vehicles. In other words, subsection 401(3) only limits the legal consequences of the jury's finding.

251 Mich App at 594 (footnotes omitted). Thus, the Court concluded that the damages limitations provision does not violate the right to a jury trial.

The majority in *Zdrojewski* agreed with this analysis and found it "equally applicable to ... the requirements of MCL 600.1483." Characterizing the assertion that plaintiff had "not only the right to have a jury determine her damages, but the unfettered right to recover precisely what the jury awarded", as a challenge to "the right of the Legislature to limit her remedy", the *Zdrojewski* majority soundly rejected it:

> As was noted in *Phillips*, *supra* at 592, the Legislature has the authority to change or abolish common law tort claims, including the ability to limit remedies for such claims. ...
>
> In sum, we hold that the noneconomic damages limitation of MCL 600.1483 is not a violation of plaintiff's right to a jury trial because the Legislature has the authority to limit remedies in tort actions, and the limitations of this statute impede neither plaintiff's ability to present her case to a jury nor the jury's ability to determine the factual extent of plaintiff's damages.

254 Mich App at 78.

A unanimous panel in *Kenkel* relied on *Phillips* and *Zdrojewski* to reach the same conclusion. The Court explained:

> In two recent decisions, this Court has held that similar limitations in actions against the lessor of a vehicle, MCL 257.4041(3), and

> actions for medical malpractice, MCL 600.1483, are constitutional. ... During oral argument, plaintiff conceded that the analysis employed in *Phillips* and *Zdrojewski* is binding here, but urged this Court to adopt the reasoning of the dissenting opinions in those cases and invoke MCR 7.215(I)(2). We decline to do so because we conclude that both *Phillips* and *Zdrojewski* were properly decided ...

256 Mich App at 548. There is no error in this analysis.

a. The Jury Is Empowered to Determine Facts, Not the Legal Consequences of Those Facts.

The damages cap does not violate the right to trial by jury. While Plaintiff cites *Rouse v Gross*, 357 Mich 475; 98 NW2d 562 (1959), for the proposition that a trial by jury includes both the rendering of a verdict and giving effect to it, the case actually says nothing about "giving effect" to the verdict. The brief discussion of the jury trial right merely states that "[t]he right of trial by jury ordinarily refers to a right to present or defend an actionable claim to 1 jury to the point of jury verdict and judgment." *Id.* at 481. Numerous courts that have upheld statutory damages limitations against assertions that they violate the right to trial by jury have noted the distinction between "finding facts" and determining the "legal consequences" of those facts. The Supreme Court of Virginia emphasized this distinction in *Etheridge v Medical Center Hospitals, supra,* stating:

> The limitation on medical malpractice recoveries ... does nothing more than establish the outer limits of a remedy provided by the General Assembly. A remedy is a matter of law, not a matter of fact. [citations omitted]. A trial court applies the remedy's limitation only after the jury has fulfilled its fact-finding function. Thus, Code § 8.01-581.15 does not infringe upon the right to a jury trial because the section does not apply until after a jury has completed its assigned function in the judicial process.
>
> Thus, although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment.

376 SE 2d at 529. Similarly, the South Carolina Supreme Court explained:

> [W]e find that the limitation on recovery as set forth in the Tort Claims Act does nothing more than establish the outer limits of a remedy provided by the legislature. A remedy is a matter of law, not a matter of fact. Although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award, the legal consequences of its assessments. Accordingly, we find that the fundamental right to a jury trial has not been infringed upon.

Wright v Colleton County School District, 301 SC 282; 391 SE 2d 564 (1990).

In *The Charles Reinhart Co v Winiemki,* 444 Mich 579, 601; 513 NW2d 773 (1994), this Court made a similar observation although in a different context:

> Juries traditionally do not decide the law or the outcome of legal conflicts ... a jury may determine what happened, how, and when, but it may not resolve the law itself.[4]

And in *Heinz v Chicago Road Investment Co,* 216 Mich App at 298, the Court of Appeals distinguished between a jury verdict and the judgment ultimately entered on that verdict:

> A jury verdict ... does not become enforceable until the court enters a judgment on that verdict. Plaintiffs' argument fails to comprehend the distinction between a judgment, which finally disposes of the claim between the parties, and the jury's verdict, which is merely the basis for the judgment.

In considering whether a petitioner was entitled to a jury trial to determine the amount of civil fines to be assessed for Clean Water Act violations, the United States Supreme Court observed that nothing in the language of the Seventh Amendment "suggests that the right to a jury trial extends to the remedy phase of a civil trial." *Tull v United States,* 481 US 412, 426, n9; 107 S Ct 1831; 95 L Ed 2d 365 (1987). Most recently, the Nebraska Supreme Court observed

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[4] In this legal malpractice case based on an attorney's alleged failure to brief and argue his client's case in the Court of Appeals, the Court held that the proximate cause issue was reserved to the court, rather than the jury. 444 Mich at 604

that the primary function of a jury is fact-finding, which includes a determination of damages. The remedy provided by the challenged cap statute, however, "is a question of law, not fact, and is not a matter to be decided by the jury." Instead, the Court said, "the trial court applies the remedy's limitation only after the jury has fulfilled its factfinding function." *Gourley v Nebraska Methodist Health System, Inc,* 265 Neb 918, 954; 663 NW2d 43 (2003).

Courts throughout the country have applied this same analysis. *See* Section II, B, *infra*. Upon such authority, the Court of Appeals correctly held that the right to trial by jury was not implicated here.

b. The Legislature May Enlarge or Modify the Remedy for Existing Rights Without Infringing the Constitutional Right to Trial By Jury.

Further, Michigan's Constitution does not recognize "a vested right in the continuance of existing remedies for injuries not yet suffered." *Shavers v Attorney General,* 402 Mich at 612. Rather, Article 3, section 7 contemplates that the common law and the statute laws may be "changed, amended or repealed." Const. 1963, art 3, § 7. As this Court observed in *Shavers*:

> Except as to vested rights, the legislative power exists to change or abolish existing statutory and common-law remedies. Common and statute law only remain in force until altered or repealed.

Shavers, 402 Mich at 612, quoting *Mackin v Detroit-Timkin Axle Co,* 187 Mich 8, 13; 153 NW 49 (1915).

That the Legislature "may alter, enlarge, modify or confer a remedy for existing rights, without infringing any principle of the Constitution" is a "well-established rule." *Nathan v Rupcic,* 303 Mich 201, 205; 6 NW2d 484 (1942). The legislative exercise of such power does not offend the Constitution. In *Shavers,* this Court held that the partial abolition of tort remedies under the Michigan No-Fault Insurance Act for persons injured by negligent motor vehicle

tortfeasors "is consistent with constitutional principles articulated by this Court." 402 Mich at 579.[5] Similarly, in *Wysocki v Kivi,* 248 Mich App 346; 639 NW2d 572 (2001), the Court of Appeals upheld the constitutionality of a comparative negligence intoxication statute that barred recovery if a plaintiff was fifty percent or more at fault because of that plaintiff's own voluntary intoxication. Among other things, plaintiff argued that removing the damages and recovery determination from the jury violated his right to a jury trial. The Court of Appeals disagreed, stating:

> We observe that Wysocki received a jury trial. The jury first determined that he was intoxicated and then at least fifty percent responsible for his injuries. We conclude that, necessarily, Wysocki had no damages and comparative fault was not an issue.

248 Mich App at 372.

In *Thompson v Fitzpatrick,* 199 Mich App 5, 6-7; 501 NW2d 172 (1992), the Court concluded that the seat belt statute did not violate due process or equal protection when it limited damages reduction to five percent, regardless of the amount of fault for the plaintiff's injuries that was caused by the failure to wear a seat belt. And in *Mackin v Detroit-Timkin Axle Co,* 187 Mich 8; 153 NW 49 (1915), the workers compensation act was deemed constitutional although it "worked fundamental changes" in the law of negligence as applied to the personal injuries of employees. This Court explained:

> It is to be recognized at the outset that workmen's compensation legislation of this class . . . works fundamental changes in the familiar principles underlying and governing the doctrine of liability for negligence as heretofore applied to the relation of master and servant. But it by no means follows that this comparatively recent and radical legislation upon the subject,

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[5] Although not relevant to the issue presently before this Court, the Court found that the Act was constitutionally deficient with respect to measures necessary to protect individual motorists who must purchase insurance, from potentially unfair insurance rates, insurance refusal or cancellation. *Id.* at 580.

> enacted to meet changed industrial conditions, and afford relief from evils and defects which had developed under the old rules of law in negligence cases for personal injuries of employees, violates the spirit or letter of our Constitution. It can be assumed without misgiving that there is no vested right in any remedy for a tort yet to happen which the Constitution protects. Except as to vested rights, the legislative power exists to change or abolish existing statutory and common-law remedies. Common and statute laws only remain in force until altered or repealed.

187 Mich at 13. *See also, Mountain Timber Co v State of Washington,* 243 U S 219; 37 S Ct 260; 61 L Ed 685 (1917)(upholding the constitutionality of State of Washington's Workmen's Compensation Act).

The damage cap contained in the Owners Liability Act is of the same genre as the above cases. The Legislature had every right to modify the statutorily imposed vicarious liability of auto lessors,[6] and the same analysis applies.

c. Jury Damages Determinations Are Routinely Altered by Statutes or Rules Authorizing Double or Treble Damages, Addittur or Remittitur, Set-Off, and the Like.

The damages cap does not introduce a new concept into the jurisprudence of this state. To the contrary, jury determinations are frequently altered before judgment is entered. Remittitur, set off, double and treble damage provisions and other similar doctrines all potentially impact the ultimate recovery.

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[6] In light of this clear statement of the Legislative prerogative, Judge Meter's dissent in *Phillips,* relied upon by Judge Fitzgerald in *Zdrojewski* and approved by two of three judges (who nonetheless followed *Zdrojewski*a) in *Wiley v Henry Ford Cottage Hospital,* No. 233220, 2003 Mich App LEXIS 1663 (2003), is not persuasive. The centerpiece of the dissent asserts that the Legislature can abolish a cause of action but cannot limit damages because the determination of damages implicates a constitutional guarantee, not a legislatively created right. The above cases demonstrate that such a distinction is not implicated here. In *Wiley*, Judge Kelly dissented from the conclusion that *Zdrojewski* was incorrectly decided and should be overruled, opining that the non-economic damages cap did not violate the Michgan Constitution.

Judge Meter distinguished remittitur as involving a component of judicial discretion in determining whether the evidence supports damages. *Phillips* at 603. But whether the jury result is altered by "judicial discretion," or a non-economic damages cap, the result is the same. Indeed, reducing the jury's damages determination by applying the non-economic damages cap is no different than reducing the jury's verdict by set-off for the payment of a settling defendant or increasing the jury's verdict by double or treble damages. These processes do not violate the right to trial by jury. *See, Markley v Oak Health Care Investors of Coldwater, Inc.,* 255 Mich App 245; 660 NW2d 344 (2003)(common law rule of setoff continues to apply in the context of joint and several liability cases in Michigan); *Shepard v Gates,* 50 Mich 495; 15 NW 878 (1883)(refused to hold that treble damage award is unconstitutional). *See also, Lane v Ruhl,* 103 Mich 38; 61 NW 347 (1894).

In *Heinz, supra,* plaintiff argued that by arbitrarily reducing the amount of the jury verdict, the statutory abrogation of the common law collateral source rule violated his right to trial by jury.[7] Before the statute was enacted, the common law collateral source rule provided that compensation from a source other than another tortfeasor could not reduce damages recoverable from the wrongdoer. The statutory abrogation permitted the admission of evidence that the expense or loss for which recovery was sought was payable by a collateral source. The

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[7] The statute, MCL 600.6303(1), provides:

> In a personal injury action in which the plaintiff seeks to recover for the expenses of medical care, rehabilitation services, loss of earnings, loss of earning capacity, or other economic loss, evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be admissible to the court in which the action was brought after a verdict for the plaintiff and before a judgment is entered on the verdict.

Court rejected the assertion that this procedure violated plaintiff's right to trial by jury, stating that the "statute does not alter the jury's assessment of the damages."

The same can be said of the statutory damages limitation. The right to jury trial is not impaired.

2. The Statutory Damages Cap Does Not Deny Equal Protection of the Laws or Violate Due Process.

The *Phillips* majority was equally adamant in its rejection of Plaintiff's equal protection challenge. The Michigan Constitution provides that "[n]o person shall be denied equal protection of the laws," Const 1963, art 1, § 2, which, the majority noted, requires that "persons similarly situated be treated alike", quoting *Wysocki v Felt,* 248 Mich App 346, 350; 639 NW2d 572 (2001). The *Phillips* majority correctly noted that different levels of review apply to this inquiry depending upon whether: (1) the challenged legislation creates an inherently suspect classification (such as race, ethnicity, or national origin) or affects a fundamental right, in which case "strict scrutiny" applies;[8] (2) whether the legislature creates classifications that are "suspect" but not "inherently suspect" (such as gender or mental capacity), in which case the intermediate "substantial relationship" test applies;[9] or (3) whether the legislation is social or economic legislation, in which case the "rational basis" test generally applies.[10]

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[8] *Citing, Crego v Coleman,* 463 Mich 248, 259; 615 NW2d 218 (2000); *Vargo v Sauer,* 457 Mich 49, 60; 576 NW2d 656 (1998), and *Proctor v White Lake Twp Police Dep't,* 248 Mich App 457, 469; 639 NW2d 332 (2001).

[9] *Citing, Proctor, supra,* and *Neal v Oakwood Hospital Corp,* 226 Mich App 701, 717; 575 NW2d 68 (1997).

[10] *Citing, People v Perlos,* 436 Mich 305, 331; 462 NW2d 310 (1990); *Wysocki v Felt,* 248 Mich App at 354; and *Proctor, supra.*

Considering this criteria, the *Phillips* majority held that the challenged legislation did not create an inherently suspect class and, rejecting Plaintiff's assertion to the contrary, held that the statute did not implicate the fundamental right to a jury trial. Thus, strict scrutiny did not apply. The Court also rejected application of the substantial relationship test, concluding that in "other cases, this Court has held that classification schemes created by various tort reform legislation are social or economic legislation subject to the rational basis test", *citing Wysocki, supra* at 366; *Stevenson v Reese,* 239 Mich App 513, 517; 609 NW2d 195 (2000); *Neal, supra,* 226 Mich App at 718, *Heinz v Chicago Road Inv Co,* 216 Mich App at 300.

Quoting this Court's decision in *Crego,* the *Phillips* majority described the rational basis test as follows:

> Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose. To prevail under this highly deferential standard of review, a challenger must show that the legislation is "arbitrary and wholly unrelated in a rational way to the objective of the statute." A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable. Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with "mathematical nicety," or even whether it results in some inequity when put into practice. Rather, the statute is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption.

251 Mich App at 597 (*quoting Crego,* 463 Mich at 259-260 with citations omitted). Applying this standard, the *Phillips* majority deemed inconsequential Plaintiff's assertion that the auto rental lobby duped the Legislature into believing that the industry needed protection from large jury-determined damages awards in order to ensure the continued operation of the auto rental business in Michigan. The *Phillips* majority explained:

> Whether we agree with this assertion is not the issue before us. The "wisdom, need or appropriateness of the legislation" is not for us to decide. *Crego, supra* at 259-260. Rather, we must determine only if "any set of facts, either known or which could reasonably be assumed" supports the Legislature's judgment. *Crego, supra* at 259-260. We find that this legislation passes that test because it can reasonably be assumed that Michigan has a legitimate interest in the continued operation of automobile rental businesses, and protecting those businesses from large damage awards in jury trials bears a rational relationship to that end.

251 Mich App at 597-598.

Determining that the test of constitutionality under equal protection and due process is "essentially the same", the *Phillips* majority also held that the Due Process Clause of the Michigan Constitution, which provides that no person "shall be deprived of life, liberty or property, without due process of law", was not violated.[11]

Using the same analysis, the *Zdrojewski* majority rejected an equal protection challenge to MCL 600.1483. Plaintiff had argued that the damages limitation was based on a classification that treated medical malpractice plaintiffs differently from others. The *Zdrojewski* majority disagreed. Rejecting the assertion that distinguishing between medical malpractice plaintiffs and other personal injury plaintiffs created a suspect class that warranted strict scrutiny, the Court emphasized that "[a]s was recently noted in *Phillips*, *supra,* the classification schemes created by various tort reform legislation are social or economic legislation subject to the rational basis test." 254 Mich App at 76. The *Zdrojewski* majority further observed that the Court of Appeals had previously rejected the notion that a suspect class was created between insured and uninsured motorists, stating that "[a] class of personal injury plaintiffs cannot be compared to classes based on race, gender, or mental capacity." *Id.* at 80. Nor, the Court said,

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[11] *Citing, Doe v Department of Social Services,* 439 Mich 650 at 682, n 36; and *Shavers v Attorney General,* 402 Mich 554, 612-613; 267 NW2d 72 (1978).

could strict scrutiny be invoked by implication of the right to jury trial because the Court had already concluded that the right was not violated.

The *Zdrojewski* majority easily found that the noneconomic damages cap was rationally related to a legitimate government purpose. The Court said:

> The purpose of the damages limitation was to control increases in health care costs by reducing the liability of medical care providers, thereby reducing malpractice insurance premiums, a large component of health care costs. *Id.* Controlling health care costs is a legitimate governmental purpose. By limiting at least one component of health care costs, the noneconomic damages limitation is rationally related to its intended purpose.

254 Mich App at 80-81. The *Zdrojewski* majority found that the statute did not violate due process for the same reason.[12]

A unanimous panel in *Kenkel* held that the analysis employed in *Phillips* and *Zdrojewski* applied with equal force to the products liability cap. Equal protection and due process were not violated because MCL 600.2946a was rationally related to the legitimate governmental interests of encouraging the manufacture and distribution of products in Michigan and protecting those who place products in the stream of commerce from large damage awards in jury trials.[13]

a. The Rational Basis Test Applies to the Equal Protection/Due Process Inquiry.

Each Michigan caps statute stands somewhat alone with respect to the equal protection and due process challenges, depending upon the objective the Legislative sought to achieve with

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[12] *Zdrojewski* was followed by the Court of Appeals in *Green v Knazik,* No. 233482, 2003 Mich App LEXIS 1848 (decided July 31, 2003)(unpublished), in *reversing* the trial court's ruling that the non-economic damages cap applicable to medical malpractice cases was unconstitutional.

[13] The *Zdrojewski* and *Kenkel* decisions also rejected the assertion that the caps violated the separation of powers doctrine of Article 3 of the Michigan Constitution. That argument is not asserted in this case.

respect to the industry within which the cap applies. However, the caps statutes also have much in common. Each was enacted in response to a perceived increase in insurance (and other industry costs) brought about by spiraling liability verdicts. Further, each is to be considered under the same standard of review. As the Court of Appeals correctly held, the constitutional standard for reviewing statutes that relate to economic [and social] matters is the rational basis test. *Heinz,* 216 Mich App at 300.

In evaluating a due process challenge, the court must ask whether the legislation bears a reasonable relation to a permissible legislative objective. *Shavers v Attorney General,* 402 Mich at 612. The test to determine whether a statute comports with equal protection is essentially the same. The "legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest." *Id.* at 613.

The rational basis test does not require the Legislature to enact laws that affect all equally. To the contrary, the Legislature may direct its attention to "what it deems an existing evil without covering the whole field of possible abuses." *Heinz, quoting Michigan AFL-CIO v Michigan Employment Relations Comm'n,* 212 Mich App 472, 483; 538 NW2d 433 (1995). Further, the legislative judgment is to be accorded a "presumption of constitutionality." *Shavers* at 613-614. This Court explained:

> What this "presumption of constitutionality" means, in terms of challenged police power legislation, is that in the face of a due process or equal protection challenge, "where the legislative judgment is drawn in question", a court's inquiry "must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it". *United States v Carolene Products Co,* 304 U.S. 144, 154; 58 S Ct 778; 82 L Ed 1234 (1938). A corollary to this rule is that where the legislative judgment *is supported by "any state of facts either known or which could reasonably be assumed",* although such facts may be "debatable", the legislative judgment must be accepted. *Carolene Products Co v Thomson,* 276 Mich 172, 178; 267 NW 608 (1936)(emphasis in original).

Courts are not to substitute their judgment for that of the Legislature. In *Ferguson v Skrupa,* 372 US 726, 730-731; 83 S Ct 1028; 10 L Ed 2d 93 (1963), the United States Supreme Court stated:

> [Courts] do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, "We are not concerned ... with the wisdom, need, or appropriateness of the legislation." Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to "subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure." ... We refuse to sit as a "superlegislature to weigh the wisdom of legislation".

This limitation on a court's rational basis review is strictly observed. As the Wisconsin Court of Appeals explained in *Guzman v St. Francis Hospital, Inc.,* 240 Wis 2d 559, 569; 623 NW2d at 776, 782 (2000):

> Although [plaintiffs] dispute that a health-care crisis justified these legislative responses, this assessment is for the legislature and not for us: "Whether the perception of a malpractice crisis was inflated or illusory makes little difference because the perceived crisis led the legislature to make a policy determination about the costs of health care."

quoting *Aicher v Wisconsin Patients Compensation Fund,* 237 Wis 2d 99; 612 NW2d 849 (2000). Indeed "equal protection analysis" is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Means v Shyam Corp,* 44 F Supp 2d 129, 133 (N H 1999), citing *FCC v Beach Communications, Inc,* 508 US 307, 313; 124 L Ed 2d 211; 113 S Ct 2096 (1993); *Sullivan v Stroop,* 496 US 478, 485; 110 L Ed 2d 438; 110 S Ct 2499 (1990). Rather, as the United States Supreme Court has stated, when Congress "strikes a balance between a victim's right to recover noneconomic damages and society's interest in protecting certain businesses from ruinously large awards, it is engaging in its fundamental role of structuring and accommodating the benefits of economic life." *Id.*, referring to *Duke Power Co,* 438 U S at 83. This means that "[t]he fact that most States place no limit upon the amount

recoverable, or that the legislative limit may seem unduly low when contrasted with recoveries in other actions, does not affect the power of the legislature, or the validity of its action." *Butler v Chicago Transit Authority,* 38 Ill 2d 361, 231 NE2d 429, 430 (1967).

So considered, the damages cap in the vehicle owners' liability statute does not deny equal protection or due process, as MIRAC's brief persuasively demonstrates.

B. THE MAJORITY OF JURISDICTIONS CONSIDERING THE ISSUE HAVE UPHELD THE CONSTITUTIONALITY OF STATUTORY DAMAGES CAPS IN A VARIETY OF CONTEXTS.

Plaintiff cites a handful of decisions from other jurisdictions that have held statutory damages caps to be unconstitutional. However, a far greater number of courts have sustained the constitutionality of statutory damages limitations in a variety of contexts, including auto leasing. The statutes impose ceilings of differing levels. Some cap all damages. Others are exclusively directed to non-economic damages or punitive damages. Some caps are triggered by the nature of the defendant, such as a health care provider or a governmental entity. Others are triggered by the nature of the action, such as wrongful death or intentional discrimination, or the nature of the injury, i.e. personal injury.

The Nebraska Supreme Court recently surveyed the nationwide caps cases, both pro and con, and although observing that "[c]ourts are split on whether a cap on damages violates the right to a jury trial" concluded that "the majority of courts hold that a cap does not violate" this right. *Gourley v Nebraska Methodist Health System, Inc,* 265 Neb 918, 953; 663 NW2d 43 (2003). Similarly, the Court concluded that a "majority of jurisdictions apply a rational basis or other similar test and determine that a statutory cap on damages does not violate equal protection." *Id.* at 946-947. As to those courts which have held that a cap violates equal protection, some apply a "heightened level of scrutiny", while others fail to give deference to the

Legislature and engage in judicial fact-finding. Still others invalidate if a replacement remedy or quid pro quo is not given. *Id.* at 950. Although not exhaustive, the following is a sampling of the cases which have upheld damages caps.

1. Auto Leasing

The constitutionality of a Florida statute that limits damages recoverable for the vicarious liability of rental car lessors was upheld in *Enterprise Leasing Co v Hughes,* 833 So 2d 832 (2002).[14] As in the present case, the plaintiffs' decedents died from injuries received in an accident that occurred when the driver of a leased motor vehicle crossed the centerline and collided with their vehicle. In the subsequent wrongful death action, the defendant auto leasing company moved to limit damages to the amount established by the statutory cap. Plaintiff argued that the cap was unconstitutional as a denial of access to the courts, the right to a jury trial, equal protection, and due process. The Florida Appeals Court disagreed. The Court said:

> This section merely limits the liability of short-term lessors. It does not preclude an individual suffering from injuries arising from a vehicle accident from suing the lessee or operator of the vehicle. The statute reduces responsibility for damages arising from the fault of others but preserves full liability for compensatory damages caused by one's own fault. The statute merely caps the amount of damages for the vicarious liability of the lessor. A plaintiff can always recover additional damages from the lessee or operator.

833 So 2d at 838. With respect to the jury trial right, the Court noted that the "jury still retains the ability to fully assess all damages against those at fault." *Id.* And, applying the rational basis test to the equal protection and due process challenges, the Court rejected the notion that the statute "discriminate[s] against plaintiffs suffering the worst injuries" or that it arbitrarily

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[14] The statute is Fla Stat ch 324.021 (2000).

limits the liability of car and truck rental companies, but not the liability of other businesses which rent or lend vehicles. *Id.* at 839. The Court explained:

> This section is rationally related to a legitimate legislative purpose. Through Chapter 99-225, the Legislature sought to shift some of the responsibility for damages due to the operation of the motor vehicle from the owner of a motor vehicle to the operator/lessee of the vehicle in short term leases. See H.R. Comm. on Judiciary, Analysis of HB 775. The statute shifts more of the liability to the actual tortfeasor.
>
> The statute also does not arbitrarily limit the liability of car and truck rental companies while excluding other commercial businesses which lend vehicles. Section 324.021(9)(c)1. includes within the definition of "rental company" those businesses that provide temporary vehicles to its customers up to ten days. This is a reasonable period of time. Generally, customers would not need a replacement vehicle for a period longer than ten days. Thus, appellee has not shown beyond a reasonable doubt that section 324.021 violates the equal protection and due process clauses of the Florida Constitution and has not overcome the presumption that the statute is constitutional. We, therefore, hold that section 324.021 does not violate the equal protection and due process clauses of the Florida Constitution.

Id. This Florida statute is extremely analogous to the case before the Court. Other damages limitations have been upheld on similar grounds against the same types of constitutional challenges.

2. Medical Malpractice

Numerous courts have upheld the constitutionality of damages limitations in the medical malpractice context utilizing the same analysis applied by the Court of Appeals here. These cases represent jurisdictions from all across the country.

Idaho: *In the Matter of the Order Certifying Questions of Law, Kirkland v Blaine County Medical Center,* 134 Idaho 464; 4 P3d 1115 (2000), is typical. There, the Supreme Court of Idaho rejected assertions that Idaho's medical malpractice non-economic damages cap, Idaho Code § 6-1603, violated the right to trial by jury, noting that the Legislature had the power to modify or repeal common law causes of action. Consistent with this power, the Legislature had

previously limited and/or eliminated the liability of defendants in certain personal injury cases involving governmental entities, employment, and ski and recreation activities, and had enacted statutes of limitation and repose "which can effectively prevent plaintiffs from recovering damages in personal injury cases." *Id.* at 468. The Court also observed that even at the time the Idaho Constitution was written, a defendant's right "to have the extent of his liability determined by a jury was legislatively altered by the imposition of statutory penalties," such as double and treble damage laws. *Id.* Further, the Court held that the jury trial right only encompassed the right to have a jury determine the facts of the case based on the evidence at trial. The "legal consequences and effect of a jury's verdict" are for the Legislature and the courts. *Id.* at 468-469. Assertions that the statute was special legislation and violated the separation of powers doctrine were also rejected. *See also, Jones v State Board of Medicine,* 97 Idaho 859, 864; 555 P2d 399, 404 (1976), *cert denied,* 431 US 914; 97 S Ct 2173, 53 L Ed 2d 223 (1977)(reversing finding that Idaho Code § 39-4294, which capped recoverable damages in medical malpractice actions, was unconstitutional and remanding for further findings with respect to constitutional issues).

Kirkland is typical of cases upholding damages caps in the medical malpractice context. They include the following:

California: *Fein v Permanente Medical Group,* 38 Cal 3d 137; 695 P2d 665 (1985)(upheld constitutionality of medical malpractice non-economic damages cap, California Civil Code § 3333.2, against challenges based on due process and equal protection.). *See also, Hoffman v United States,* 767 F2d 1431 (9th Cir 1985)(to same effect).

Colorado: *Scholz v Metropolitan Pathologists, PC,* 851 P2d 901 (Colo 1993)(damages cap imposed by 6A Colo Rev Stat §§ 13-64-302 (1992 Supp) satisfied rational basis test).

Florida: *University of Miami v Echarte,* 618 So 2d 189 Fla 1993)(Fla Stat Ann 766.207 and 766.209 (Supp 1988), which capped non-economic damages in medical malpractice cases when a party requests arbitration, do not violate the right of access to the courts, right to jury trial, equal protection, or due process, among other challenges).[15]

Indiana: *Bova v Roig,* 604 NE2d 1 (1992)(Statutory damages cap in Indiana Code, § 16-9.5-2-2 (repealed and replaced with similar provision, at § 534-18-143 (2003)), sustained against challenges based on due process, right to jury trial, equal protection, special legislation, denial of access to courts, right to full and complete remedy, and improper irrebuttable presumption, the Court deeming itself bound by the Indiana Supreme Court's decision in *Johnson v St. Vincent's Hospital,* 237 Ind 374; 404 NE2d 585 (1980) (limitation of recovery in medical malpractice action when health care provider elects to come under the Indiana Medical Malpractice Act, Ind. Code §§ 16-9.5-2-1 through 16-9.5-2-2(b), upheld against equal protection, due process, right to jury trial constitutional challenges.).

Louisiana: *Butler v Flint Goodrich Hospital,* 607 So 2d 517 (La 1992)(Louisiana's cap on general damages in a medical malpractice suit against multiple defendants, LSA-R.S. 40:1299.42(B)(1), is constitutional). *See also, LaMark v NME Hospitals, Inc,* 542 So2d 753 (La App), cert denied, 551 So2d 1334 (LA 1989)(to same effect).

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[15] "Section 766.209(3) provides that if the defendant refuses arbitration, the claimant proceeds to trial without any limitation on damages and is entitled to receive reasonable attorney's fees up to twenty-five percent of the award. Section 766.209(4) provides that if a claimant refuses a defendant's offer to arbitrate, then a claimant proceeds to trial; however, noneconomic damages are capped at $350,000 per incident." *University of Miami,* 618 So 2d at 193. The issue with respect to the "access to court" challenge was whether the statutes provided claimants with a "commensurate benefit" for the loss of the right "to fully recover non-economic damages." *Id.* at 194.

Massachusetts: *English v New England Medical Center, Inc,* 405 Mass 423; 541 NE2d 329 (1989), cert denied, 493 US 1056; 110 S Ct 866; 107 L Ed 2d 949 (1990)(charitable organizations liability cap set forth in Mass. Gen. Laws ch. 231, § 85k did not violate right to jury trial, equal protection or due process).

Missouri: *Adams v Children's Mercy Hospital,* 832 SW2d 898 (Mo banc 1992)(Mo. Rev. Stat. § 538.210 (1986), which caps non-economic damages in medical malpractice actions, does not violate constitutional guarantees of jury trial, due process, equal protection).

Nebraska: *Gourley v Nebraska Methodist Health System, Inc,* 265 Neb 918; 663 NW2d 43 (2003)(medical malpractice liability cap does not violate equal protection, separation of powers, open courts provisions or the right to jury trial). *See also, Prendergast v Nelson,* 199 Neb 97; 256 NW2d 657 (1977)(ceiling on recovery for elective medical panel review is not unconstitutional).

Virgin Islands: *Davis v Omitowoju,* 883 F.2d 1155 (3d Cir 1989)(applying the rational basis test, the Virgin Islands statutory medical malpractice non-economic damages cap, 27 V.I.C. § 166b (1975), was upheld against constitutional due process and equal protection challenge; the right to jury trial challenge was also rejected).[16]

Virginia: *Etheridge v Medical Center Hospitals,* 237 Va 87, 376 SE2d 525 (Va 1989) (Va Code Ann § 8.01-581.15 (Supp 1988), limiting recovery in an action for medical malpractice, is constitutional). *See also, Boyd v Bulala,* 877 F2d 1191 (4th Cir 1989)(relying on *Etheridge*) and *Pulliam v Coastal Emergency Services of Richmond, Inc.,* 257 Va 1; 509 SE 2d 307 (1999)(reaffirming *Etheridge*).

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[16] The Court also said that its analysis and discussion was "equally applicable" to the 1986 amended version of 27 V I C § 166b, which limits both economic and non-economic verdicts.

West Virginia: *Robinson v Charleston Area Medical Center, Inc.,* 186 W Va 720; 414 SE 2d 877 (1991)(W. Va. Code § 55-7B-8, as amended, which caps non-economic damages in a medical malpractice action, is constitutional). *See also, Verba v Ghaphery,* 210 W Va 30; 552 SE 2d 406 (2001)(relying upon *Robinson).*

Wisconsin: *Guzman v St. Francis Hospital, Inc.,* 240 Wis 2d 559; 623 NW2d 776 (Wis 2000)(cap on the recovery of non-economic damages in medical malpractice actions does not violate right to jury trial, due process or equal protection).[17]

3. Wrongful Death

Cases upholding the constitutionality of a *wrongful death* damages cap include:

Colorado: *Pollock v Denver,* 194 Colo 380; 572 P2d 828 (1977)(wrongful death cap, § 13-21-203, C.R.S. 1973, does not violate equal protection).

Illinois: *Butler v The Chicago Transit Authority,* 38 Ill 2d 361, 231 NE 2d 429 (1967)(limitation of recovery under Wrongful Death Act, Ill. Rev. Stat. 1965, chap. 70, par. 2, is constitutional).

Kansas: *Leiker v Gafford,* 245 Kan 325; 778 P2d 823 (Kan 1989), overruled on other grounds, in *Martindale v Tenny*, 250 Kan 621; 329 P2d 561 (1992) (Kansas' wrongful death cap on non-pecuniary damages, Kan Stat Ann § 60-1903 (1988 Supp), upheld against equal protection, due course of law, and right to jury trial challenges).

Texas: *Rose v Doctors Hospital,* 801 S W 2d 841 (Tex 1990)(upholding constitutionality of cap on damages for wrongful death under Tex. Rev. Civ. Stat. 4590i; § 11.02

4. Employment

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[17] The cap involves several statutes. They include: Wisconsin Stat. § 655.017, § 893.55(4)(d), § 893.55(4)(f), § 894.04(4), § 895.045, and § 893.55(4)(c).

Federal: *Pollard v E I duPont Nemours & Co,* 213 F3d 933, 945-946 (6th Cir 2000), rev'd on other grounds, 532 US 843, 121 S Ct 1946, 150 L Ed 2d 62. (Statutory cap on intentional discrimination, provided by 42 USC § 1981a, is constitutional). *See also, Madison v IBP, Inc,* 257 F3d 780 (8th Cir 2001)(to same effect).

Iowa: *Channon v United Parcel Service, Inc,* 629 NW2d 835 (Iowa 2001) (Civil Rights Act cap on recovery for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other non-pecuniary losses in intentional discrimination claims, 42 USCS § 1981a(b)(3), upheld against equal protection, due process, right to jury trial and separation of powers challenges).

Montana: *Meech v Hillhaven West, Inc,* 776 P2d 488; 238 Mont 21 (Mont 1989)(Montana wrongful discharge from employment act provision prohibiting recovery of non-economic damages and limiting recovery of punitive damages, MCA § 39-2-905 (1) and (2), is not unconstitutional).

New Hampshire/Federal: *Means v Shyam Corp,* 44 F Supp 2d 129 (D N H 1999)(42 USC § 1981a(b)(3)(A), which imposes a cap on certain compensatory and punitive damage awards, upheld against equal protection challenge).

Washington/Federal: *Passantino v Johnson & Johnson Consumer Products, Inc,* 982 F Supp 786, 788 (WD Wash 1997)(cap on federal damages found in 42 U S C § 1981a(b)(3) is not unconstitutional).

Wisconsin/Federal: *Equal Employment Opportunity Commission v CEC Entertainment,* 2000 US Dist LEXIS 13934 (WD Wis 2000)(Civil Rights Act damages cap, 42 USCS § 1981a(b)(3), does not violate equal protection or right to jury trial).

5. State and Municipal Liability

Alabama: *Garner v Covington County,* 624 So 2d 1346 (Ala 1993)(Ala. Code § 11-93-2 cap on recovery against governmental entities upheld against constitutional challenge.).

Florida: *Cauley v City of Jacksonville,* 403 So 2d 379 (Fla 1981)(Fla Stat ch 768.28(5)(1977), which limits damages recoverable in tort against a municipality, does not violate right to trial by jury, access to courts, separation of powers or due process). *See also, Jetton v Jacksonville Electric Authority,* 399 So 2d 396 (Fla 1981).

Illinois: *Swope v Northern Illinois Gas Co.,* 221 Ill App 3d 241; 581 NE2d 819 (1991)(limit of $100,000 on tort recovery against state does not violate due process).

Mississippi: *Wells v Panola County Board of Education,* 645 So 2d 883 (1994 Miss)(upholds constitutionality of Mississippi Accident Contingent Fund limitation recovery for school bus accidents, Miss. Code Ann. § 37-41-41 (Supp. 1992), for accident occurring before effective date of statute repeal).

Missouri: *Richardson v State Highway & Transportation Comm'n,* 863 SW2d 876 (Mo banc 1993) (The Mo. Rev. Stat. § 537.610 (Supp 1989) cap on damages against the state does not deny equal protection, due process or the right to jury trial). *See also, Schumann v Missouri Highway and Transportation Comm'n,* 912 SW2d 548 (1995)(relying on *Richardson*) and *Fisher v State Highway Comm'n,* 948 SW2d 607 (Mo 1997)(rejecting other constitutional challenges).

Nevada: *Arnesano v State of Nevada,* 113 Nev 815; 942 P2d 139 (Nev 1997)(rejecting constitutional challenge to Nev. Rev. Stat.§ 41.035(1), which caps damage recoveries against the state.).

New Hampshire: *Estate of Cargill v City of Rochester,* 119 N H 661; 406 A 2d 704 (1979)(rejecting due process challenge to N.H. Rev. Stat § 507(B)(4) limiting damages to $50,000 for injuries incurred in city maintenance shed explosion and fire).

Oregon: *Jensen v Whitlow,* 334 Ore 412; 51 P3d 599 (2002)(Ore. Rev. Stat. § 30.270(1)(b), which caps damages recoverable against a public body, is constitutional).[18]

Tennessee: *Crowe v John W Harton Memorial Hospital,* 579 SW 2d 888 (Tenn 1979)(ordinance limiting damages in medical malpractice action against community hospital did not violate due process).

Utah: *Parks v Utah Transit Authority,* 449 Utah Adv Rep 12; 53 P3d 473 (2002)(damages cap imposed by § 63-30-34 of the Utah Code does not violate due process, uniform operation of laws, or right to trial by jury).

6. Punitive Damages

Alaska: *Evans v State,* 56 P3d 1046 (2002) (punitive damages cap is constitutional and does not infringe on the right to trial by jury). Followed in *Central Bering Sea Fishermen's Ass'n v Anderson,* 54 P3d 271 (2002).

North Carolina: *Rhyne v K-mart Corp.,* 149 N C App 672; 562 SE 2d 82 (2002)(upheld North Carolina General Statute § 1D-25, which caps the recovery of punitive damages, against a variety of constitutional challenges).[19]

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[18] The Court distinguished an earlier Oregon decision which had held that a statutory cap on non-economic damages was unconstitutional. *Lakin v Senco Products, Inc.,* 329 Ore 62, 987 P2d 463 (1999).

[19] With respect to the jury trial right, the Court reasoned that "no individual possesses the right to punitive damages as being that person's property", and courts have held that jury trials are not constitutionally required in a wide range of civil cases that do not "respect" property. 562 SE 2d 88.

7. Nuclear Liability

Federal: *Duke Power Co v Carolina Environmental Study Group, Inc,* 438 U S 59, 98 S Ct 2620, 57 L Ed 2d 595 (1978)(upheld statutory ceiling on liability for a nuclear accident resulting from federally licensed privately owned nuclear power plants).

8. Dramshop Liability

Maine: *Peters v Saft,* 597 A2d 50 (1991 Maine)(court determined that damages cap included in Maine's Liquor Liability Act, 28-A M.R.S.A. §§ 2501-2519 (1988), is constitutional).

9. Other Personal Injury

Alaska: *Evans v State,* 56 P3d 1046 (Alas 2002) (upholding cap on non-economic and punitive damages in tort and wrongful death actions for personal injury, AS 09.17.010, .020; ch 26, § § 9-10, SLA 1997, against challenge based on right to jury trial, equal protection, due process, separation of powers, right of access to courts, and prohibition against special legislation.

Kansas: *Samsel v Wheeler Transport Services, Inc,* 246 Kan 336; 789 P2d 541 (Kan 1990)(upheld a limit on damages for pain and suffering). *See also, Bair v Peck,* 248 Kan 824; 811 P2d 1176 (1991)(elimination of vicarious liability in medical malpractice context does not violate the constitution).

Maryland: *Franklin v Mazda Motor Corp,* 704 F Supp 1325 (D Md 1989)(Maryland statute limiting award for non-economic damages in a personal injury action is constitutional. Courts Art, § 11-108(b), Md Code). *See also, Murphy v Edmonds,* 325 Md 342; 601 A2d 102 (Md 1992)(Maryland's $350,000 statutory cap on non-economic damages in personal injury

actions is constitutional), and *Owens-Corning v Walatka,* 125 Md App 313; 725 A2d 579 (Md 1999)(rejecting constitutional challenge).[20]

South Carolina: *Wright v Colleton County School Dist,* 301 S C 282, 291-292; 391 SE2d 564, 570 (1990) (Tort Claims Act limitation on recovery, § 15-78-120(a)(1) and (a)(2), upheld against right to jury trial, right to remedy, equal protection, and separation of powers challenges.).

RELIEF REQUESTED

Amicus Curiae Michigan State Medical Society requests that this Court affirm the Court of Appeals' decision in *Phillips v MIRAC, Inc.,* and uphold the constitutionality of MCL 257.401(3).

KERR, RUSSELL AND WEBER, PLC

By: Joanne Geha Swanson
Richard D. Weber (P22073)
Joanne Geha Swanson (P33594)
Attorneys for Amicus Curiae
Michigan State Medical Society
Detroit Center, Suite 2500
500 Woodward Avenue
Detroit, MI 48226-3406
313.961.0200

Dated: September 22, 2003

[20] The statute is Maryland Code (1974, 1989 Repl Vol), § 11-108 of the Courts and Judicial Proceedings Article.

LEXSEE 2003 MICH APP LEXIS 1848

LESLIE GREEN, Personal Representative of the Estate of Timothy Dorton, Deceased, LESLIE GREEN and DAVID DORTON, Individually, Plaintiffs-Appellees, v STEPHEN KNAZIK, D.O., STEPHEN KNAZIK, D.O., P.C., and CHILDREN'S HOSPITAL OF MICHIGAN, Defendants-Appellants.

No. 233482

COURT OF APPEALS OF MICHIGAN

2003 Mich. App. LEXIS 1848

July 31, 2003, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: LC No. 98-804549-NH.

DISPOSITION: Affirmed.

JUDGES: Before: Smolenski, P.J., and White and Wilder, JJ.

OPINION: PER CURIAM.

Defendants appeal as of right from a judgment entered in favor of Plaintiff, Estate of Timothy Dorton n1. We affirm.

n1 A two count complaint was filed against defendants. In Count I, the Estate of Timothy Dorton asserted a claim for medical negligence under the wrongful death act. Count II of the complaint alleged bystander claims, individually, on behalf of Leslie Green (decedent's mother) and David Dorton (decedent's father). The case was submitted to the jury and the jury returned a verdict, however, on Count I only. Hereafter, then, the term "plaintiff" refers solely to the Estate of Timothy Dorton.

Plaintiff filed this wrongful death action alleging that acts of medical malpractice were committed by defendant Dr. Knazik n2 at defendant [*2] Children's Hospital, resulting in the death of plaintiff's decedent, Timothy Dorton (Timothy). n3 Timothy was taken to the emergency room at Children's Hospital on March 9, 1996 by his mother, Leslie Green, and his grandmother, Debra Green, because he had been vomiting and had diarrhea. Dr. Knazik examined Timothy and discharged him later that afternoon. Timothy was pronounced dead in the Children's Hospital Emergency Room at 4:36 a.m. on March 10, 1996. Plaintiff alleges that Timothy died from dehydration that defendant failed to diagnose. Defendants asserted that Dr. Knazik was not negligent, that Timothy was not dehydrated when he was discharged by Dr. Knazik, but instead Timothy became dehydrated sometime after being released from Dr. Knazik's care.

n2 When used in the singular, the term "defendant" refers to Dr. Knazik.

n3 Timothy died one day before he was to turn 14-months old.

[*3]

At the close of plaintiff's proofs, defendants moved for directed verdict on the basis that plaintiff failed to present expert testimony establishing a breach of the requisite standard of care. The trial court denied the motion. The case was presented to the jury, which returned a verdict in favor of Plaintiff. Judgment entered for plaintiff in the amount of $ 990,911.87. Defendants moved for judgment notwithstanding the verdict, new

trial and/or remittitur, asserting that plaintiff had failed to present testimony that the standard of care had been breached, and that pursuant to *MCL 600.1483*, plaintiff could not recover in excess of $ 280,000.00 in damages for noneconomic loss. This motion was also denied by the trial court.

On appeal, defendants raise three issues. Defendants first claim that the trial court erred when it concluded that plaintiff had presented sufficient evidence of a breach of the standard of care and denied their motions for directed verdict and judgment notwithstanding the verdict. We review de novo the trial court's decision on a motion for directed verdict or motion for judgment notwithstanding the verdict. *Wilkinson v Lee, 463 Mich. 388, 391;* **[*4]** *617 N.W.2d 305 (2000).* We review the evidence and all legitimate inferences arising from the evidence in the light most favorable to the nonmoving party to determine whether the evidence fails to establish a claim as a matter of law. *Id.*

We conclude that plaintiff presented sufficient evidence that Dr. Knazik breached the applicable standard of care. In a medical malpractice case, expert testimony must be presented that establishes both the applicable standard of care, and that it was more likely than not that the defendant breached that standard. *Wiley v Henry Ford Cottage Hosp*, ___ Mich. App. ___; ___ N.W.2d ___ (Docket No. 233220, issued 7/10/03), slip op at 3. Plaintiff's expert, Dr. Bachman, testified that in his opinion, the notes recorded in the decedent's medical chart did not reflect that Dr. Knazik took an adequate history of the patient, and that this failure to obtain an adequate history constituted a breach of the standard of care. Dr. Bachman also opined that the notes in the medical chart did not support the conclusion reached by Dr. Knazik that dehydration could be ruled out, and that Dr. Knazik's failure to diagnose the degree of the decedent's **[*5]** dehydration and supply adequate treatment for the same was also a breach of the standard of care.

Defendants attack this testimony as no more than a criticism of the adequacy of the charting which, without more, is insufficient to establish a breach of the standard of care. Defendants further contend that the testimony of Dr. Knazik and Leslie Green establishes that Dr. Knazik's examination of decedent was well within the standard of care and sufficient to rule out dehydration at the time of the examination. A health care professional's failure to keep adequate records is not a breach of the standard of care unless the failure contributes to the patient's injuries. *Boyd v Wyandotte, 402 Mich. 98, 104-105; 260 N.W.2d 439 (1977); Zdrojewski v Murphy, 254 Mich. App. 50, 64; 657 N.W.2d 721 (2002).* However, the "failure to keep adequate records may raise issues regarding credibility or burden of persuasion." *Zdrojewksi, supra at 64.*

Here, plaintiff asserts not that Dr. Knazik's record keeping methods contributed to decedent's death, but rather that the inadequate charting is *evidence* that Dr. Knazik failed **[*6]** to conduct a complete examination and render the proper treatment, and that if he had done a comprehensive examination within the standard of care, this examination would have would have revealed that decedent was dehydrated at the time of the examination. Testimony by plaintiff's causation witnesses, that because decedent died within twelve hours of being examined by Dr. Knazik, he was more likely than not dehydrated at the time of the examination, supports Dr. Bachman's opinion that despite Dr. Knazik's testimony that he conducted an examination within the standard of care, decedent's death from dehydration twelve hours later supports a contrary conclusion.

Moreover, Dr. Knazik's testimony about the examination was based on his asserted custom and practice, since he had little independent recollection of his examination of decedent. The sufficiency of the charting, then, is highly relevant in regard to the credibility of Dr. Knazik's testimony about this particular examination. Thus, reviewing the evidence and inferences from the evidence in the light most favorable to plaintiff, we conclude that the trial court did not err by denying defendants' motions for directed verdict and **[*7]** judgment notwithstanding the verdict.

Defendants next assert that the trial court erred in finding that the medical malpractice noneconomic damages cap imposed in *MCL 600.1483* is unconstitutional. We agree. We review issues of constitutional law de novo. *McDougall v Schanz, 461 Mich. 15, 23; 597 N.W.2d 148 (1999).* "Statutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *McDougalll, supra at 24.* In *Zdrojewski v Murphy, 254 Mich. App. 50, 74-82; 657 N.W.2d 721 (2002),* this Court squarely addressed this issue and found the noneconomic damages cap in *MCL 600.1483* to be constitutional. Thus, pursuant to *Zdrojewski*, the trial court's ruling that the statute is unconstitutional must be reversed.

Defendants last contend that the trial court erred by not applying the medical malpractice noneconomic damages caps found in *MCL 600.1483* to the jury verdict here. We disagree. This Court reviews questions of statutory interpretation de novo. **[*8]** *Jenkins v Patel, 256 Mich. App. 112, 113-114; 662 N.W.2d 453 (2003).* In *Jenkins*, this Court held that in a wrongful death action filed under the Michigan wrongful death act (WDA), *MCL 600.2922*, the WDA governs the award of

noneconomic damages arising out of a death caused by medical malpractice, thereby precluding the application of the medical malpractice cap found in *MCL 600.1483*. Applying *Jenkins* to the facts herein, we find that the trial court did not err by declining to apply the medical malpractice noneconomic damages cap to the verdict returned by the jury in this case.

For the foregoing reasons, we affirm.

/s/ Michael R. Smolenski

/s/ Helene N. White

/s/ Kurtis T. Wilder